

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 13, 2006 Session

HOMEBUILDERS MCGEE & STORY, LLC., ET AL. v. HENRY BUCKNER

Appeal from the Circuit Court for Davidson County
No. 01C-2411 Barbara N. Haynes, Judge

No. M2005-02643-COA-R3-CV - Filed on March 30, 2007

This appeal arises from a dispute between a homeowner and a contractor concerning an expansion and remodeling of the homeowner's residence. When the project was only 30% complete, the homeowner fired the contractor, following which each party sued alleging breach of contract and a myriad of other claims. Following a bench trial, the trial court found the Construction Management Agreement the parties entered into was not enforceable because the parties never had a meeting of the minds. Accordingly, it dismissed the parties' respective breach of contract claims. Each party appeals contending the agreement is enforceable and that each is entitled to damages. We have concluded the Agreement constitutes an enforceable contract because it sufficiently identifies the scope of the work and the price of the work, which was an agreed budget of \$175,000 with a management fee of "Cost Plus 17%." We also find the contractor is entitled to damages for breach of contract.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Reversed in Part and Affirmed in Part

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Jean Dyer Harrison, Nashville, Tennessee, for the appellant, Henry Buckner.

G. Kline Preston, IV, Nashville, Tennessee, for the appellee, Homebuilders McGee and Story, LLC.

OPINION

Henry Buckner owned a substantial home and spacious lot in the Forest Hills neighborhood of Nashville, Tennessee, to which he desired to make substantial renovations and improvements. To this end, he consulted with various people in search of a builder to do the work. Mr. Buckner's brother, who had recently renovated his home, recommended Homebuilders McGee and Story, LLC.

Based upon his brother's recommendation, Mr. Buckner met with Homebuilders in early May 2000 to discuss the addition of a garage with a room above it, renovation of the existing kitchen and bathroom, expansion of the living room, construction of a patio, and the eventual construction of a pool surrounded by a retaining wall. Shortly thereafter, Mr. Buckner entered into a written "Construction Management Agreement" with Homebuilders. Pursuant to the Agreement, Homebuilders was to complete the scope of the work pursuant to drawings referenced in the Agreement for an agreed budget of \$175,000.¹ The Agreement also provided that the fee to Homebuilders for the services of managing and "providing completion of the building of the specified home [would] be a total of Cost Plus 17%."

Construction began on the property in July 2000 with the removal of trees from the property. The parties appeared to be in harmony until August, when Mr. Buckner received the invoices for tree removal, excavation, and concrete, which he believed were excessive. As a consequence, Mr. Buckner became concerned about the expense of the project and whether the agreed budget of \$175,000 would cover everything. He was assured by Homebuilders that the project was still within budget.

By October, Mr. Buckner's concerns escalated, and he asked for an accounting of the project from Homebuilders and was provided with a document titled "Cost Estimate" showing the total cost to complete construction would be \$289,204.² Homebuilders explained the substantial increase was due to the addition of the retaining wall and other changes that were requested and authorized by Mr. Buckner. Insisting he had not authorized additional expenses, Mr. Buckner terminated Homebuilders' services on October 31, 2000. The project was approximately 30% complete when Homebuilders was fired.

After Mr. Buckner refused to pay the balance Homeowners claimed was owed, Homebuilders filed a Complaint against Mr. Buckner on August 10, 2001, for breach of contract. In return, Mr. Buckner filed a Counterclaim for fraud, breach of contract, violations of the Tennessee Consumer Protection Act, negligent misrepresentation, negligence, and breach of fiduciary duty. Following a three-day bench trial, the trial court dismissed both parties' breach of contract claims on a finding the Construction Management Agreement was not enforceable because the parties never had a meeting of the minds. The trial court also dismissed all other claims of each party, including Mr.

¹The Agreement refers to attached drawings, but the parties have agreed the drawings were not actually attached to the Agreement. The drawings were, however, attached to the building permit obtained from the City of Forrest Hills, and are sufficient to show the project for which the parties contracted.

²This sum represents the original contract price of \$175,000 for the work specified in the Construction Management Agreement and \$114,204 for additional work, including the retaining wall and the pool.

Buckner's claims for fraud, violations of the Tennessee Consumer Protection Act, negligent misrepresentation, negligence, and breach of fiduciary duty.³

Both parties appeal contending the agreement is enforceable and that each is entitled to damages. We have determined the Construction Management Agreement constitutes an enforceable contract which sufficiently identifies the scope of the work and the price of the work, which was an agreed budget of \$175,000 with a management fee of "Cost Plus 17%." We have also concluded that Homebuilders is entitled to damages based on Mr. Buckner's breach of contract in the amount of \$25,328.

STANDARD OF REVIEW

The interpretation of a contract is a question of law. *Guiliano v. Cleo, Inc.* 995 S.W.2d 88, 95 (Tenn. 1999). Therefore, the trial court's interpretation of a contract is not entitled to a presumption of correctness under Tenn. R. App. P. 13(d) on appeal. *Angus v. Western Heritage Ins. Co.*, 48 S.W.3d 728, 739 (Tenn. Ct. App. 2000). Accordingly, we will review these contractual issues *de novo* and reach our own independent conclusions regarding their meaning and legal import. *Guiliano*, 995 S.W.2d at 95; *Hillsboro Plaza Enterprises v. Moon*, 860 S.W.2d 45, 47 (Tenn. Ct. App. 1993).

With regard to findings of fact by a trial court, we review the record *de novo* and presume that the findings of fact are correct unless the preponderance of the evidence is otherwise. We also give great weight to a trial court's determinations of credibility. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). However, if the trial judge has not made a specific finding of fact on a particular matter, we will review the record to determine where the preponderance of the evidence lies without employing a presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

The weight, faith and credit to be given to a witness' testimony lies with the trial judge in a non-jury case because the trial judge had an opportunity to observe the manner and demeanor of the witness. *Roberts v. Roberts*, 827 S.W.2d 788, 795 (Tenn. Ct. App. 1991); *Weaver v. Nelms*, 750 S.W.2d 158, 160 (Tenn. Ct. App. 1987). There is no presumption of correctness with respect to the trial court's conclusions of law. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); Tenn. R. App. P. 13(d).

ANALYSIS

The first issue that requires our analysis is whether the parties entered into an enforceable agreement. The trial court found the parties did not have a meeting of the minds and the Agreement was unenforceable. We respectfully disagree.

³Mr. Buckner does not appeal the dismissal of his claims for negligent misrepresentation, fraud, or breach of fiduciary duty.

A.

To establish a claim for breach of contract, the plaintiff must show that a contract existed. *Forest Inc. of Knoxville v. Guaranty Mortgage Co.*, 534 S.W.2d 853, 857 (Tenn. Ct. App. 1975). This can be done by establishing that there was a meeting of the minds, mutual assent to the contractual terms, consideration, and that the contractual terms were sufficiently definite. *Id.* (citing *American Lead Pencil Co. v. Nashville, C. & St.L. Ry.*, 134 S.W. 613 (Tenn. 1911)). One of the essential elements to a valid contract is mutual assent or a “meeting of the minds.” *Moore v. New Amsterdam Cas. Ins. Co.*, 199 F.Supp. 941, 945 (E.D.Tenn. 1961). “While a contract may be either expressed or implied, or written or oral, it must result from a meeting of the minds of the parties in mutual assent to the terms . . . [and be] free from fraud or undue influence. . . .” *Johnson v. Cent. Nat'l Ins. Co. of Omaha, Nebraska*, 356 S.W.2d 277, 281 (Tenn. 1962); *see also Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001).

In determining whether the necessary elements of a contract exist, if an intent to come to a definite agreement can be shown, the contract should be construed to constitute an agreement rather than to defeat one. *Neilson & Kittle Canning Co. v. F.G. Lowe & Co.*, 260 S.W. 142, 143 (Tenn. 1924). A contract includes not only promises set out in expressed words, but also all such implied provisions as are indispensable to effectuate the intentions of the parties and as arise from the language of the contract and the circumstances under which it is made. *Sacramento Navigation Co. v. Salz*, 273 U.S. 326, 329 (1927).

The primary test as to the actual character of a contract is the intention of the parties, to be gathered from the whole scope and effect of the language used, and mere verbal formulas, if inconsistent with the real intention, are to be disregarded. It does not matter by what name the parties chose to designate it. But the existence of a contract, the meeting of the minds, the intention to assume an obligation, and the understanding are to be determined in case of doubt not alone from the words used, but also the situation, acts, and the conduct of the parties, and the attendant circumstances.

17 Am.Jur.2d Contracts § 1 (1964).

The parties entered into a written agreement. The work to be performed by Homebuilders was sufficiently identified in drawings referenced in the written agreement, which drawings were also filed with the City of Forrest Hills in order to obtain the building permit. The written agreement also identified a “budget” of \$175,000 for the work to be performed by Homebuilders and it specified that Homebuilders would be paid a “management fee.” The management fee was to be 17% of the total cost of the work.

While the terms and conditions of the parties’ agreement are not as definite as with most contracts, they are sufficient to evidence the parties’ meeting of the minds and are sufficiently

definite to form the basis of the parties' agreement. We therefore find the parties entered into a binding agreement sufficient to sustain an action for breach of contract.

B.

Having determined the Construction Management Agreement is an enforceable contract, we must examine the parties competing breach of contract claims. When resolving disputes concerning contract interpretation, we are to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contractual language. *Hamblen County v. City of Morristown*, 656 S.W.2d 331, 333-34 (Tenn. 1983). The cardinal rule for interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention consistent with legal principles. *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578 (Tenn. 1975); *Rainey v. Stansell*, 836 S.W.2d 117, 119 (Tenn. Ct. App. 1992). All provisions in the contract should be construed in harmony with each other, if possible, to promote consistency and to avoid repugnancy between the various provisions of a single contract. *Guiliano*, 995 S.W.2d at 95 (citing *Rainey* 836 S.W.2d at 118-19).

The Agreement reveals the intent of the parties was for Homebuilders to complete the renovations to Mr. Buckner's residence pursuant to the drawings referenced in the Agreement. The drawings show the interior renovations to be done as well as the addition to the structure. Moreover, the same drawings were attached to the application for the building permit from the City of Forrest Hills, the stated purpose of which was for "single family addition – garage and bonus room." Significantly, the drawings did not include or reference a swimming pool or the construction of a retaining wall, which would be essential in order to build the swimming pool.

It is further evident from the terms of the Agreement that the budget for this work was \$175,000 and that Homebuilders would receive a management fee of 17% of the budgeted \$175,000 project. This financial arrangement is further evidenced by the fact the Agreement is entitled "Construction *Management* Agreement." (emphasis added).

Considering all provisions of the contract in harmony with each other to promote consistency and to avoid repugnancy between the various provisions of the contract, it is evident the sum of \$175,000 was the agreed upon cost of the work to be completed. It is further evident from the Agreement that Homebuilders was to receive a fee of "17%" of the budgeted cost of the work for Homebuilders' management services. Therefore, assuming the project came in on budget, the planned budget being \$175,000, Homebuilders would have been entitled to a management fee in the amount of \$29,750.⁴

⁴\$29,750 is 17% of \$175,000.

C.

We have determined the parties entered into an agreement whereby Homebuilders would do the work shown in the drawings, which did not include a swimming pool or retaining wall.⁵ We have also determined that Homebuilders was entitled to a management fee of 17% of the cost of construction. These issues having been decided, the issue to address is whether one of the parties breached the contract.

Homebuilders contends it was wrongfully terminated and that it is entitled to damages in the amount of its costs plus the management fee it is entitled to receive. Mr. Buckner contends he justifiably terminated the contract due to Homebuilders going over budget and breaching the contract by charging him for work that was within the original contract.

Specifically, Mr. Buckner contends the total cost was not to exceed \$175,000, which amount included Homebuilders' 17% construction management fee. We, however, have determined the plain language of the Agreement does not support this assertion.

Additionally, Mr. Buckner contends Homebuilders had no right to claim fees or costs for alleged "change orders" because the Agreement required that all change orders be in writing and he did not approve any change orders. The Agreement required that all change orders be in writing, however, the conduct of the parties reveals that both parties waived the requirement that the change orders be in writing. Considering all of the above, we have concluded the evidence preponderates in favor of a finding that Mr. Buckner wrongfully terminated the contract.

D.

With that decided, we must determine whether Homebuilders sustained any damages as a result of Mr. Buckner's wrongful termination of the contract, and if so, how much.

"The purpose of assessing damages in breach of contract cases is to place the plaintiff as nearly as possible in the same position she would have been in had the contract been performed, but the nonbreaching party is not to be put in any better position by recovery of damages for the breach of the contract than he would have been if the contract had been fully performed." *BVT Lebanon Shopping Ctr., Ltd. v. Wal-Mart Stores*, 48 S.W.3d 132, 136 (Tenn. 2001)(citing *Lamons v. Chamberlain*, 909 S.W.2d 795, 801 (Tenn. Ct. App. 1993)). Damages for breach of contract include only such as are "incidental to or directly caused by the breach and may be reasonably supposed to have entered into the contemplation of the parties." *BVT Lebanon Shopping Ctr.*, 48 S.W.3d at 136 (citing *Simmons v. O'Charley's, Inc.*, 914 S.W.2d 895, 903 (Tenn. Ct. App. 1995)). This rule seeks to protect the non-breaching party's "expectation interest." *BVT Lebanon Shopping Ctr.*, 48 S.W.3d at 136.

⁵This finding is supported by the building permit obtained from the City of Forrest Hills, the purpose of which was for "single family addition - garage and bonus room."

The record reveals that approximately 30% of the work provided for in the original Agreement had been completed when Mr. Buckner wrongfully terminated the contract, but Homebuilders had also performed a significant amount of work in addition to that specified in the original drawings, much of which pertained to the retaining wall and swimming pool. Homebuilders' expectation was to recover the cost of construction and to receive, in addition thereto, a management fee in the amount of 17% of the cost of construction.

Had Homebuilders been allowed to finish the project, the total cost of the work would have totaled \$289,204.⁶ The Agreement provided the total fee to Homebuilders for its services in the "managing and providing completion of the building of the specified home will be a total of Cost Plus 17%." Had Mr. Buckner not wrongfully terminated the agreement, the total cost would have been \$289,204, 17% of which is \$49,164.68. Homebuilders had received \$23,836 toward its management fee, thus, Homebuilders is entitled to recover its damages in the amount of \$25,328, being the balance of the management fee it was entitled to receive for "managing" \$289,204 of construction.

MR. BUCKNER'S COUNTERCLAIM

Mr. Buckner asserted several claims against Homebuilders in addition to its claim of breach of contract. He alleged Homebuilders was negligent in the construction of the retaining wall. Specifically, he asserts Homebuilders did not conform to a reasonable standard of care as evidenced by substandard work and failure to perform within the agreed upon budget. The trial court found that Mr. Buckner had not carried his burden of proof to support this claim, and we have concluded the evidence does not preponderate against that finding.

The record reveals that Mr. Buckner failed to sustain his burden of proving that Homebuilders negligently constructed the wall and that he sustained damages. The wall was constructed pursuant to applicable codes, and the City of Forrest Hills approved the design of the wall. The only damages Mr. Buckner showed were the costs to tear down the wall and build another one, but the record does not support a finding that this was necessary due to defective construction of the original wall. Thus, we find Mr. Buckner's claim for negligence was properly dismissed.

Mr. Buckner also alleged that Homebuilders violated Tenn. Code Ann. § 47-18-104(b)(27), of the Tennessee Consumer Protection Act, which prohibits acts or practices that are deceptive to the consumer. Mr. Buckner bases this claim on an alleged representation that "the addition to the home and the pool and wall could be accomplished for \$175,000." The trial court found that Mr. Buckner had not carried his burden of proof to support this claim, and we have concluded the evidence does not preponderate against that finding.

⁶This includes the original budget of \$175,00 plus the change order work that Homebuilders had performed.

IN CONCLUSION

The parties entered into an enforceable Construction Management Agreement, which Mr. Buckner breached. As a consequence of Mr. Buckner's breach of contract, Homebuilders is entitled to recover damages in the amount of \$25,328. We affirm the trial court in all other respects.

The judgment of the trial court is reversed in part and affirmed in part, and this matter is remanded with costs of appeal assessed against Appellant, Henry Buckner.

FRANK G. CLEMENT, JR., JUDGE